May 7, 2018

Hon. Kevin Flynn
Minister of Labour
400 University Avenue (14th Floor)
Toronto, Ontario M7A 1T7

Re: Bill 148 – *Fair Workplaces, Better Jobs Act, 2017*

Dear Minister Flynn,

We are writing in support of a broad position being put forward by a growing list of organizations in the construction industry (i.e. CECCO, COCA, EPSCA, ORCCA, etc.) requesting an exemption from the Personal Emergency Leave and Scheduling requirements set out in Bill 148: *Fair Workplaces, Better Jobs Act, 2017* (the Act). This request is due to what we believe are unintended and unexamined consequences of the application of these provisions in a construction-employment environment.

Since consultations for the *Changing Workplaces Review* were initiated, the message from the government was that construction would be exempt from certain provisions in Bill 148, although this did not occur. Several of our signatory members have noted that certain provisions in the *Act* will have a disproportionate, negative impact on the construction industry. These provisions, in particular those related to "Personal Emergency Leave (PEL) Days" and "Scheduling," are contrary to historical industry practices. These changes ignore the well-established understanding between employers and employees in the industry. That is employees in the construction sector earn a relatively higher wage accounting for the transient nature of the workforce and truncated work season which renders other benefits inapplicable in a construction environment.

Personal Emergency Leave Days (section 50.5)

As noted above, the effective functioning of the construction industry is contingent on a project-based workforce, as well as short, production-based schedules. Given the nature of this industry's employment and work environment, the potential exists for an individual to work for multiple employers over the course of a calendar year and take two PEL days with each of these employers. This scenario, which may become quite common across the construction industry, distorts the intended benefit and erodes labour stability and project scheduling in the process.

Scheduling (section 21.3 and 21.6)

Construction is a distinct employment sector of the provincial economy, as reflected by the special provisions granted to it in the *Ontario Labour Relations Act* (OLRA) and the *Employment Standards Act* (ESA). Particularly in the heavy civil construction sector, worksite locations often change day-by-day, and the work is highly uncertain due to a host of unpredictable and uncontrollable factors (i.e. varying on-site conditions, permitting, utility locates, weather, etc.). Given this uncertainty, there is a long-established, construction industry-wide understanding that workers will receive a higher hourly-wage when they are working, but only receive compensation for hours worked.

Heavy civil construction projects rely on a “just-in-time” production and delivery schedule, as most typical road, excavation, and bridge projects do not have the available space to stockpile needed materials on site (e.g. aggregate, pipe/conduit, precast retaining walls, etc.), nor can certain materials (i.e. asphalt and concrete) be reliably scheduled and produced for delivery more than a few hours in advance due to potential spoilage. Vital sectors of the construction workforce are, therefore, relied upon to simply be “on call” as needed (e.g. dump truck operators; aggregate haulers; dewatering specialist; etc.). These sectors of the industry, as noted above, are compensated appropriately for this convenience, as it is a necessity of the business. The scheduling provisions laid out in the *Act* will disrupt this process, adding substantial cost and waste onto infrastructure construction projects, as well as having the potential to adversely impact contractual obligations to meet schedule and service delivery certainty.

Example of Bill 148 Industry Impact: Provincial Winter Maintenance

To highlight the impact of select Bill 148 provisions on the provincial heavy civil construction industry, we offer the below example.

The highway maintenance industry (i.e. snow removal services) in the province is critical to ensuring that provincial highways remain open and safe for the motoring public. This sub-sector of the industry is staffed predominately with seasonal employees, most of whom are unscheduled, as their work is dependent upon inclement weather. These seasonal staff are employed under the strict understanding that they are only afforded 2-3 hours of advanced notice for when they are required to be on site, given that this is about as accurate a timeline that can be provided to predict winter weather forecasting. If this sub-sector is required to follow the rules of Bill 148, highway winter equipment operators would constantly be in non-compliance regarding the 96-hour notice period for scheduling.

Furthermore, Ministry of Transportation (MTO) contract language requires the contractor to staff a specific number of pieces of equipment during inclement weather or risk being in violation of the contract performance measures for safe public travel on provincial highways. Due to the limited number of qualified winter equipment operators and the MTO requirement that contractors staff the relevant equipment with these qualified persons during any inclement weather, winter maintenance contractors would frequently be in violation of MTO performance measures and Hours of Service/Commercial Vehicle Operators Registration requirements, if they are forced to comply with these regulations. This would also substantially revise the labour force requirements on these long-term contracts that were not accounted for when these agreements were initially signed.

In conclusion, this letter is not an exhaustive list of potential negative impacts related to the Act, but merely highlights two of our industry sub-sectors’ major concerns. It is our expectation that the unintended consequences from the *Act* will increase both in number and intensity without a full exclusion for the construction industry as was originally understood to have been the case during the *Changing Workplaces Review*.

As noted above, the long-established trade-offs and arrangements that were entered into between employers and employees in the construction industry (i.e. a relatively higher wage in exchange for employee flexibility) were made on the basis of the laws that applied at the time. It is unreasonable to assume that employers would be agreeable to a statute that provides employees with both a higher relative wage and the additional entitlements (e.g. 3-hour minimum pay for scheduling issue, PEL days). In other words, if the new *Act* were in place at the time of negotiations for construction employee's salary, most notably the 3-hour minimum and PEL day entitlement, employers would not have been inclined to offer such an inflated wage rate.

Sincerely,

Giovanni Cautillo
Executive Director, Ontario Sewer and Watermain Construction Association

David Caplan
Chief Operating Officer, Ontario Road Builders' Association

Peter Smith
Executive Director, Heavy Construction Association of Toronto

Rob Bradford
Executive Director, Toronto Area Road Builders Association

Norm Cheesman
Executive Director
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